

1 QUINN EMANUEL URQUHART &
2 SULLIVAN, LLP

3 Andrew H. Schapiro (*pro hac vice*)
4 andrewschapiro@quinnemanuel.com
5 191 N. Wacker Drive, Suite 2700
6 Chicago, IL 60606
7 Telephone: (312) 705-7400
8 Facsimile: (312) 705-7401

9 Stephen A. Broome (CA Bar No. 314605)
10 stephenbroome@quinnemanuel.com
11 Viola Trebicka (CA Bar No. 269526)
12 violatrebicka@quinnemanuel.com
13 865 S. Figueroa Street, 10th Floor
14 Los Angeles, CA 90017
15 Telephone: (213) 443-3000
16 Facsimile: (213) 443-3100

17 Diane M. Doolittle (CA Bar No. 142046)
18 dianedoolittle@quinnemanuel.com
19 555 Twin Dolphin Drive, 5th Floor
20 Redwood Shores, CA 94065
21 Telephone: (650) 801-5000
22 Facsimile: (650) 801-5100

23 *Attorneys for Defendant; additional counsel*
24 *listed in signature blocks below*

BOIES SCHILLER FLEXNER LLP
Mark C. Mao (CA Bar No. 236165)

mmao@bsflp.com
44 Montgomery Street, 41st Floor
San Francisco, CA 94104
Telephone: (415) 293 6858
Facsimile: (415) 999 9695

SUSMAN GODFREY L.L.P.
William Christopher Carmody (*pro hac vice*)
bcarmody@susmangodfrey.com
Shawn J. Rabin (*pro hac vice*)
srabin@susmangodfrey.com
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Telephone: (212) 336-8330

MORGAN & MORGAN
John A. Yanchunis (*pro hac vice*)
jyanchunis@forthepeople.com
Ryan J. McGee (*pro hac vice*)
rmcgee@forthepeople.com
201 N. Franklin Street, 7th Floor
Tampa, FL 33602
Telephone: (813) 223-5505

Attorneys for Plaintiffs; additional counsel
listed in signature blocks below

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

20 CHASOM BROWN, MARIA NGUYEN,
21 WILLIAM BYATT, JEREMY DAVIS, and
22 CHRISTOPHER CASTILLO, individually
and on behalf of all other similarly situated,

23 Plaintiffs,

24 v.

25 GOOGLE LLC,

26 Defendant.

Case No. 5:20-cv-03664-LHK

**JOINT CASE MANAGEMENT
STATEMENT**

Judge: Hon. Lucy H. Koh
Courtroom 8 – 4th Floor
Date: January 13, 2021
Time: 2:00 p.m.

CASE NO. 5:20-cv-03664-LHK

Pursuant to Federal Rule of Civil Procedure 16, Civil Local Rules 16-9 and 16-10, the Standing Order for All Judges of the Northern District of California, the Court's Order of September 3, 2020 (Dkt. No. 61), and in advance of the Further Case Management Conference set by the Court for Wednesday, January 13, 2021, at 2:00 p.m., Plaintiffs and Defendant, Google LLC ("Google"), submit this Joint Case Management Statement to report the parties' progress since the Initial Joint Case Management Statement was filed on September 2, 2020 (Dkt. No. 59).

I. JURISDICTION AND SERVICE

The parties agree that Google has been served and that the Court has jurisdiction over this matter.

II. FACTS

The parties have no new facts to add at this time.

III. LEGAL ISSUES

The parties have no new legal issues to present at this time.

IV. MOTIONS

Motions Decided Since the Last Joint CMC Statement

On September 3, 2020, the Court denied Google's Motion to Stay Discovery (Dkt. No. 60). After Plaintiffs filed their First Amended Complaint on September 21, 2020 (Dkt. No. 68), the Court denied Google's Motion to Dismiss the Complaint (Dkt. No. 53) and Motion to Stay Discovery (Dkt. No. 56) as moot on October 6, 2020. Dkt. No. 74. Plaintiffs filed an Unopposed Motion for Leave to Propose Revised Motion to Dismiss Briefing Schedule (Dkt. No. 62), which the Court granted on September 8, 2020 (Dkt. No. 63). The parties met and conferred on September 30, 2020, and stipulated to a revised motion to dismiss briefing schedule (Dkt. No. 71). The Court granted the stipulation on October 5, 2020 (Dkt. No. 73). The Court also granted the parties' Joint Stipulation Extending Time for Submitting Proposed Protective Order and ESI Order (Dkt. No. 72). Several motions for admission *pro hac vice* have been filed (Dkt. Nos. 64, 69, 75, 85), all of which have been granted (Dkt. Nos. 65, 78, 79, 86).

1 Pending Motions

2 Plaintiffs filed their First Amended Complaint on September 21, 2020 (Dkt. No. 68). Google
 3 filed a motion to dismiss the First Amended Complaint on October 21, 2020 (Dkt. No. 82). Plaintiffs
 4 filed their opposition to Google's motion to dismiss on November 18, 2020 (Dkt. No. 87), and
 5 Google filed its reply brief in support of the motion to dismiss on December 7, 2020 (Dkt. No. 92).
 6 The hearing on Google's motion to dismiss has been scheduled for February 25, 2021 at 1:30 p.m.
 7 (Dkt. No. 82).

8 Anticipated Motions

9 ***Plaintiffs' Statement:***

10 Plaintiffs anticipate moving for class certification and may also seek summary judgment
 11 and/or adjudication on certain claims or issues.

12 ***Google's Statement:***

13 To the extent any claims survive the Motion to Dismiss, Google anticipates moving for
 14 summary judgment, opposing plaintiffs' motion for class certification, and/or filing a motion to deny
 15 class certification.

16 **V. AMENDMENT OF PLEADINGS**

17 On September 21, 2020, Plaintiffs filed their First Amended Complaint (Dkt. No. 68).
 18 Plaintiffs do not anticipate amending the First Amended Complaint prior to the Court's ruling on
 19 Google's MTD.

20 **VI. EVIDENCE PRESERVATION**

21 The parties represent that they have taken steps to preserve evidence relevant to this
 22 litigation. The parties similarly have reviewed the Northern District of California Guidelines
 23 Relating to the Discovery of ESI and, pursuant to Fed. R. Civ. P. 26(f), have discussed generally the
 24 preservation of relevant evidence. The status of an ESI protocol is discussed in the Discovery section
 25 below.

26 **VII. DISCLOSURES**

27 The parties exchanged initial disclosures on September 8, 2020.

1 **VII. DISCOVERY**

2 A. Case Schedule

3 The parties held their initial Rule 26(f) discovery planning conference by video on August
4 19, 2020 and have conferred on discovery topics several times since then. The Court adopted an
5 initial discovery plan in its September 3, 2020 Case Management Order (Dkt. No. 61).

6 B. Written Discovery

7 Plaintiffs served two sets of requests for admissions (“RFAs”) on October 7, 2020 and
8 December 23, 2020, respectively. Google served its responses and objections to the first set of RFAs
9 on November 6, 2020; the deadline to serve objections and responses to the second set of RFAs is
10 January 22, 2020. Plaintiffs served two sets of document requests on September 30, 2020 and
11 October 19, 2020, respectively. Google served objections and responses to the first set on October
12 30, 2020 and to the second set on December 2, 2020. Plaintiffs also served interrogatories on
13 December 23, 2020. The deadline to serve objections and responses is January 22, 2020.

14 Google served document requests, interrogatories and RFAs on the five named plaintiffs on
15 November 20, 2020 and agreed to extend the deadline to serve objections and responses to January
16 11, 2021.

17 C. Protective Order

18 The parties were able to agree on all terms of a protective order, which Magistrate Judge
19 Susan van Keulen approved on October 15, 2020 with one revision to the provision related to the
20 right to further relief (Dkt. No. 81).

21 D. ESI Protocol

22 The parties stipulated to an order related to ESI discovery, which Judge van Keulen approved
23 on October 15, 2020 (Dkt. No. 80). On November 20, 2020, the parties submitted a joint letter brief
24 to Judge van Keulen identifying one disputed point regarding the ESI order, related to timing of
25 preservation duties. On November 30, 2020, Judge van Keulen resolved the dispute in an order and
26 issued a First Modified Stipulated Order re: Discovery of Electronically Stored Information for
27 Standard Litigation (Dkt No. 91).

1 E. Document Discovery Updates

2 ***Plaintiffs' Statement:***

3 Since the Court denied Google's motion to stay discovery (Dkt. No. 60), and set an August
4 2021 deadline for completing fact discovery (Dkt. No. 61), Plaintiffs have sought to move forward
5 with discovery. Plaintiffs have so far served Google with two sets of document requests (including
6 149 requests), two sets of requests for admission (including 14 requests), and one set of
7 interrogatories (including three interrogatories).

8 Plaintiffs' primary concern at this point is Google's continuing refusal to produce documents
9 responsive to Plaintiffs' requests. Plaintiffs have been meeting and conferring with Google for
10 months, but Google has continued to drag its feet, stand on meritless objections, and delay
11 production of relevant documents. It has been over four months since the Court denied Google's
12 motion to stay discovery, and Google has in that time only produced 11,947 documents, all of which
13 are otherwise publicly available.

14 Plaintiffs have raised discovery issues with Magistrate Judge van Keulen in the first
15 instance,¹ consistent with the Court's orders, and will continue to do so, but Plaintiffs want to
16 nonetheless flag three discrete issues here for the Court's reference. These issues stem from
17 Plaintiffs' First Set of Document Requests, served on September 30, 2020, and have been discussed
18 during multiple meet and confers.

19 Google's regulator productions: In September 2020, Plaintiffs asked Google to produce all
20 documents "Google produced, provided, or otherwise disclosed to Regulators in connection with
21 any request, investigation, or action concerning Google's data collection practices and disclosures."
22 Ex. A at 8 (Request No. 1). Plaintiffs flagged their request for these documents in the prior Joint
23 Case Management Conference Statement (Dkt. No. 59 at 6), and they then served this request. In
24

25 _____
26 ¹ Plaintiffs and Google filed a joint letter brief with Magistrate Judge van Keulen to resolve a
27 dispute concerning the parties' ESI preservation cutoff date (Dkt No. 90). Plaintiffs contended that
28 the cutoff date should be June 1, 2008 (shortly before Google launched "Incognito" private browsing
mode), but Google requested a June 1, 2014 cutoff date. Magistrate Judge van Keulen ordered
Google to preserve ESI created or received after June 1, 2008 for designated custodians (Dkt No.
91). Plaintiffs are seeking information to identify designated custodians.

1 response, Google initially refused to produce any documents. Ex. B at 6-7 (Google’s response).
 2 After multiple meet and confers, Google has proposed to substantially narrow this request in ways
 3 that Plaintiffs believe will yield minimal or no documents.² Plaintiffs wanted Google to produce
 4 these regulator documents at the outset, to help focus and streamline discovery in this action, and
 5 avoid unnecessary discovery duplication. Documents disclosed to Regulators regarding Google’s
 6 data collection practices and privacy disclosures would be immensely helpful in untangling how
 7 Google collects and stores user data as well what Google itself may have thought about its various
 8 privacy disclosures.

9 Plaintiffs also seek these documents to determine the extent to which Google has taken
 10 inconsistent positions regarding its privacy policy and disclosures, such as by representing to
 11 regulators that consumers have control over Google’s data collection practices, and that Google
 12 honors its representations on privacy. On its Incognito pop-up splash screen, Google promises that:
 13 (a) it will not save “[y]our browsing history,” (b) it will not save “[c]ookies and site data,” and (c)
 14 users can “[b]lock third-party cookies.” (Dkt. No. 68 ¶¶ 52, 139.) Plaintiffs allege that these Google
 15 representations are false, and none of these controls work. Google responds in its motion to dismiss
 16 that it is authorized to collect all of this data regardless. Plaintiffs are entitled to know whether
 17 Google has taken inconsistent positions, including with regulators on matters such as Google’s
 18 compliance with privacy consent decrees it entered into in 2011 and 2012 with the Federal Trade
 19 Commission. Moreover, these are documents Google already produced, which Google can search
 20 and produce in this action. Plaintiffs seek regulator documents that bear on the issues in this case,
 21 and this is not (as Google claims below) improper “cloned discovery.” *See, e.g., Jones v. Deutsche*
 22 *Bank AG*, No. 5:04-CV-5357 JW (RS), 2005 WL 8177848, at *4 (N.D. Cal. Nov. 17, 2005)

23
 24 ² On December 14, 2020, Google proposed limiting this request to “(i) US regulator inquiries;
 25 (ii) during the purported class period; (iii) related to privacy; (iv) in the context of browsing; and (v)
 26 relating to logged-out activity.” This is insufficient. Google has neither stated whether any
 27 documents even exist with this proposed narrowing (Plaintiffs suspect there are none) nor has
 28 Google identified what documents might otherwise exist that are responsive to the request. Google’s
 proposal would exclude the two foreign proceedings identified in the FAC (limiting production to
 “US regulator inquiries”), exclude two of the three FTC actions identified in the FAC (which
 predated the class period but resulted in the 2011 Consent Decree), and potentially result in the
 production of zero documents with the proposed “relating to logged-out activity” limitation.

1 (ordering defendant to produce documents previously produced “to any government agency” that
 2 relate to the illegal conduct); *Google, Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. 03-CV-5340
 3 JF (RS), 2006 WL 5349265, at *1 (N.D. Cal. Feb. 8, 2006) (Google willingly produced documents
 4 from other litigation “since it posed no burden to Google to provide copies of the Geico documents
 5 to American”).

6 Plaintiffs are willing to continue meeting and conferring with Google, and to raise these
 7 issues with Magistrate Judge van Keulen, but any guidance from the Court may be useful in terms
 8 of moving this forward to a resolution.

9 Google documents from Arizona action: In September 2020, Plaintiffs also asked Google
 10 to produce “[u]nredacted versions of the filings (including exhibits and attachments) and all
 11 discovery from *State of Arizona ex rel. Mark Brnovich, Attorney General v. Google LLC*, No. CV
 12 2020-006219 (Ariz. Superior Ct. 2020). Ex. A at 9 (Request No. 2). Plaintiffs sought those
 13 documents in part because one filing from the Arizona action included multiple redacted documents
 14 produced by Google, some of which are plainly relevant in this action. For example, one of those
 15 documents includes a February 2, 2017 email from one Google employee (name redacted by
 16 Google) referencing “work in progress” at Google “trying to rein in *the overall mess that we have*
 17 *with regards to data collection, consent, and storage.*” Ex. C at 2 (emphasis added). This was in
 18 response to a Google employee (name redacted by Google) asking whether “users with significant
 19 privacy concerns understand what data we are saving?” *Id.* Another Google employee (name
 20 redacted by Google) stated this was “super messy” and users needed to “make sense out of this
 21 mess.” *Id.* at 1-2. Such documents are especially relevant given Google’s assertion of a consent
 22 defense in its pending motion to dismiss (Dkt. No. 82), but Google has refused to produce any
 23 unredacted version of this email exchange, or any other documents from the Arizona action.
 24 Plaintiffs proposed that Google at least initially produce unredacted versions of the documents from
 25 the Arizona action that were cited in their First Amended Complaint (*see* Dkt. No. 68 ¶¶ 34-37), but
 26 Google has refused to produce any responsive documents. Instead, Google asks Plaintiffs to take it
 27 at its word that these documents involve issues unrelated to Plaintiffs’ claims notwithstanding the
 28 fact that these documents plainly concern “data collection, consent, and storage” as well as Google

1 employee's concerns over users' "privacy concerns." This is not how discovery works – Google
2 cannot unilaterally decide to withhold documents, which it has already collected, that are not only
3 relevant to Plaintiffs' core allegations but also demonstrate its sweeping, uniform strategy to collect
4 user data without proper consent across its multiple platforms and functionalities.

5 Google custodial documents: Plaintiffs have also sought to engage in a meaningful meet
6 and confer with Google regarding custodians, so that the parties can negotiate a reasonable set of
7 document custodians, search terms, and production criteria. To proceed efficiently, Plaintiffs first
8 sought information through the ESI Order meet and confer process (Dkt. No. 80) and production of
9 documents needed to identify custodians (Ex. A at 10 (Request Nos. 11 & 12)). Google, however,
10 refused to identify any Google custodian by name during the ESI meet and confers, and Google has
11 still not produced the documents responsive to Request Nos. 11 & 12. Plaintiffs are increasingly
12 concerned that Google's delays will undermine their ability to negotiate a set of custodians and
13 search terms and obtain those documents in a timely fashion. Deadlines may assist the parties in
14 moving this forward with Google's production of custodial documents. Google states below that it
15 intends to make a proposal regarding custodians, but Plaintiffs also need documents from Google
16 to evaluate the sufficiency of any such proposal (documents Google still has not produced, even
17 though Plaintiffs requested them in September 2020) and a proposal regarding search terms.

18 ***Google's Statement:***

19 Plaintiffs mischaracterize the Parties' ongoing discovery negotiations and, in any event, the
20 disputes presented are not ripe for this Court's review. The parties are not presently at an impasse
21 on any of the issues Plaintiffs identify, nor have Plaintiffs raised the issues with Magistrate Judge
22 van Keulen in the first instance. Indeed, the parties have not even met and conferred on the 130
23 Requests in Plaintiffs' Second Set of Requests for Production. This Statement is not the forum for
24 inchoate discovery disputes on which the parties have not yet met and conferred. Accordingly,
25 Google responds to Plaintiffs' arguments only briefly, below.

26 Google is complying with its discovery obligations by diligently investigating ESI sources,
27 producing documents, and responding to the avalanche of discovery requests that Plaintiffs have
28 propounded. This case centers on three individuals who allege that a handful of public Google

1 disclosures led them to believe that when they used private browsing Google would not receive data
2 about their browsing session from third party publishers using certain Google services. Despite the
3 narrow scope of this dispute, Plaintiffs have thus far served 149 RFPs, as well as numerous RFAs
4 and Interrogatories. Google timely responded and has met and conferred with Plaintiffs to resolve
5 the parties' disputes. Given the substantial number of requests Plaintiffs served, many of which are
6 facially overbroad (among other defects), the parties' negotiations are ongoing. Nevertheless, as
7 Plaintiffs admit, Google has already produced nearly 12,000 documents in response to Plaintiffs'
8 requests, including documents central to Plaintiffs' claims that Google's disclosures about private
9 browsing were misleading or insufficient.

10 In stark contrast to Google's responses and significant production, Plaintiffs have provided
11 no discovery responses and produced nothing. On November 20, 2020, Google served 18 RFPs, 6
12 Interrogatories, and 1 RFA. Plaintiffs requested an extension, and have not yet responded or
13 produced a single document.

14 Google's regulator productions: It is undisputed that Google's Privacy Policy—to which
15 Plaintiffs consented when they signed up for their Google accounts—discloses that Google receives
16 the types of data at issue in this case when users visit websites that use Google's advertising and
17 analytics services. Yet Plaintiffs allege that, in the same Privacy Policy (and other disclosures,
18 including the Incognito splash screen), Google represented that using a browser's "private
19 browsing" mode would prevent Google from receiving such data. For instance, Plaintiffs claim
20 above that Google made "false" "promises" to users that their browsing history, cookies, and site
21 data would not be saved, and that users can "[b]lock third-party cookies." But Google's Motion to
22 Dismiss demonstrates the shortcomings in Plaintiffs' argument, which are evident on the face of
23 each at-issue disclosure. The case thus turns on a relatively straightforward interpretation of
24 Google's disclosures regarding private browsing, and in particular private browsing in Google
25 Chrome's "Incognito" mode. In discovery, however, Plaintiffs broadly seek all documents Google
26 provided to any regulators world-wide in connection with any request concerning Google's data
27 collection practices and disclosures generally, regardless of which Google product or service is at
28 issue. It is well-established that the kind of sweeping cloned discovery Plaintiffs seek is improper,

1 not proportional, and violates Federal Rule of Civil Procedure 34(b)(1)(A). *See, e.g., In re*
 2 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 2017 WL 4680242, at *1
 3 (N.D. Cal. Oct. 18, 2017) (collecting cases); *see also Goro v. Flowers Foods, Inc.*, 2019 WL
 4 6252499, at *18 (S.D. Cal. Nov. 22, 2019) (seeking “all documents produced in another matter is
 5 not generally proper. The propounding party cannot meet its burden to establish relevance [as they
 6 are] not in a position to even know what they are actually asking for.”). The cloned discovery is
 7 particularly unnecessary here where Plaintiffs have propounded 149 RFPs seeking far-reaching
 8 discovery from Google. To satisfy Plaintiffs’ request, the parties are currently negotiating a more
 9 targeted scope of production for documents provided to regulators.

10 Google documents from Arizona action: For similar reasons, Plaintiffs’ request that Google
 11 produce here all discovery it produced to the Arizona Attorney General is baseless. Unlike this case,
 12 which concerns web browsing data that Google received while users were in private browsing mode,
 13 the Arizona AG’s case concerns Google’s collection of geolocation data. One case has nothing to
 14 do with the other, and the fact that both cases relate to data privacy generally does not justify cloned
 15 discovery.

16 Google custodial documents: Plaintiffs’ accusation that Google has delayed custodial
 17 productions falls flat. On September 30, 2020, Plaintiffs requested in writing that Google “hold off
 18 on the collection, review, and production of custodial documents.” After meeting and conferring on
 19 Plaintiffs’ requests for production, Google informed Plaintiffs that it is willing to engage in
 20 custodian and search term negotiations. Only recently, on December 23, 2020, did Plaintiffs inform
 21 Google that they would now like to begin those negotiations.

22 Plaintiffs have sought the names of the hold custodians. Pursuant to the Court’s Checklist
 23 for Rule 26(f) Meet and Confer Regarding ESI (“ESI Checklist”), Google has already provided
 24 “general job titles” of hold custodians. Google is also preparing and will disclose to Plaintiffs an
 25 initial list of proposed ESI custodians.

26 **IX. CLASS ACTIONS**

27 The parties respectfully refer the Court to their respective positions concerning this topic in
 28 the Initial Joint Case Management Statement (Dkt. No. 59).

X. RELATED CASES

The parties respectfully refer the Court to their joint position concerning this topic in the Initial Joint Case Management Statement (Dkt. No. 59).

XI. RELIEF

The parties respectfully refer the Court to their respective positions concerning this topic in the Initial Joint Case Management Statement (Dkt. No. 59).

XII. SETTLEMENT AND ADR

No settlement discussions have taken place. Pursuant to ADR Local Rule 3-5 and Civil Local Rule 16-8, on August 19, 2020, the parties met and conferred regarding the available dispute resolution options and filed their respective ADR Certifications. The parties do not believe that ADR is appropriate at this time.

XIII. CONSENT TO MAGISTRATE FOR ALL PURPOSES

As stated in the Initial Joint Case Management Statement (Dkt. No. 59), the parties respectfully declined to proceed before a Magistrate Judge.

XIV. OTHER REFERENCES

As stated in the Initial Joint Case Management Statement (Dkt. No. 59), the parties do not believe this case is suitable for reference to binding arbitration or a special master, and it is premature to know whether referral to a special master is appropriate.

XV. NARROWING OF ISSUES

The parties will continue to consider issues that can be narrowed by agreement or by motion, as well as potential means to expedite the presentation of evidence at trial.

XVI. EXPEDITED TRIAL PROCEDURE

As stated in the Initial Joint Case Management Statement (Dkt. No. 59), the parties agree that this case is not suitable for handling under the Expedited Trial Procedure of General Order No. 64.

XVII. PROPOSED CASE SCHEDULE

The Court adopted a case schedule in its September 3, 2020 Case Management Order, Dkt. No. 61, and approved the parties proposed revised MTD briefing schedule (Dkt. No. 73).

1 **XVIII. TRIAL**

2 The parties respectfully refer the Court to their respective positions concerning this topic in
3 the Initial Joint Case Management Statement (Dkt. No. 59).

4 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

5 As stated in the Initial Joint Case Management Statement (Dkt. No. 59), Google filed its
6 Certificate of Interested Entities (Dkt. No. 52).

7 **XX. PROFESSIONAL CONDUCT**

8 As stated in the Initial Joint Case Management Statement (Dkt. No. 59), all attorneys of
9 record have reviewed the Guidelines for Professional Conduct for the Northern District of
10 California.

11 **XXI. OTHER ISSUES**

12 The parties have no other issues which require the Court's attention.
13
14

15 DATED: January 6, 2021

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

17 By /s/ Andrew H. Schapiro

18 Andrew H. Schapiro (admitted *pro hac vice*)
19 andrewschapiro@quinnemanuel.com
19 191 N. Wacker Drive, Suite 2700
20 Chicago, IL 60606
20 Tel: (312) 705-7400
21 Fax: (312) 705-7401

22 Stephen A. Broome (CA Bar No. 314605)
23 stephenbroome@quinnemanuel.com
23 Viola Trebicka (CA Bar No. 269526)
24 violatrebicka@quinnemanuel.com
24 865 S. Figueroa Street, 10th Floor
25 Los Angeles, CA 90017
25 Telephone: (213) 443-3000
26 Facsimile: (213) 443-3100

27 Diane M. Doolittle (CA Bar No. 142046)
28 dianedoolittle@quinnemanuel.com

1 Thao Thai (CA Bar No. 324672)
2 thaothai@quinnemanuel.com
3 555 Twin Dolphin Drive, 5th Floor
4 Redwood Shores, CA 94065
5 Telephone: (650) 801-5000
6 Facsimile: (650) 801-5100

7 William A. Burck (admitted *pro hac vice*)
8 williamburck@quinnemanuel.com
9 Josef Ansorge (admitted *pro hac vice*)
10 josefansorge@quinnemanuel.com
11 1300 I. Street, N.W., Suite 900
12 Washington, D.C. 20005
13 Telephone: 202-538-8000
14 Facsimile: 202-538-8100

15 Jomaire A. Crawford (admitted *pro hac vice*)
16 jomairecrawford@quinnemanuel.com
17 51 Madison Avenue, 22nd Floor
18 New York, NY 10010
19 Telephone: (212) 849-7000
20 Facsimile: (212) 849-7100

21 Jonathan Tse (CA Bar No. 305468)
22 jonathantse@quinnemanuel.com
23 50 California Street, 22nd Floor
24 San Francisco, CA 94111
25 Telephone: (415) 875-6600
26 Facsimile: (415) 875-6700

27 Attorneys for Defendant
28 Google LLC

1 DATED: January 6, 2021

SUSMAN GODFREY L.L.P.

2
3 By /s/ Amanda Bonn

4 Mark C. Mao (CA Bar No. 236165)
mmao@bsflp.com
5 Sean Phillips Rodriguez (CA Bar No. 262437)
srodriguez@bsflp.com
6 Beko Rebitz-Richardson (CA Bar No. 238027)
brichardson@bsflp.com
7 Alexander Justin Konik (CA Bar No. 299291)
akonik@bsflp.com
8 BOIES SCHILLER FLEXNER LLP
9 44 Montgomery Street, 41st Floor
10 San Francisco, CA 94104
11 Telephone: (415) 293 6858
Facsimile (415) 999 9695

12 James W. Lee (*pro hac vice*)
jlee@bsflp.com
13 Rossana Baeza
rbaeza@bsflp.com
14 BOIES SCHILLER FLEXNER LLP
15 100 SE 2nd Street, Suite 2800
Miami, FL 33130
16 Telephone: (305) 539-8400
Facsimile: (305) 539-1304

17 William Christopher Carmody (*pro hac vice*)
bcarmody@susmangodfrey.com
18 Shawn J. Rabin (*pro hac vice*)
srabin@susmangodfrey.com
19 Steven Shepard (*pro hac vice*)
sshepard@susmangodfrey.com
20 SUSMAN GODFREY L.L.P.
21 1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
22 Telephone: (212) 336-8330

23 Amanda Bonn (CA Bar No. 270891)
abonn@susmangodfrey.com
24 SUSMAN GODFREY L.L.P.
25 1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
26 Telephone: (310) 789-3100
27
28

1
2 John A. Yanchunis (*pro hac vice*)
3 jyanchunis@forthepeople.com
4 Ryan J. McGee (*pro hac vice*)
5 rmcgee@forthepeople.com
6 Michael F. Ram (*pro hac vice*)
7 mram@forthepeople.com
8 Ra O. Amen (*pro hac vice*)
9 ramen@forthepeople.com
10 MORGAN & MORGAN, P.A.
11 201 N Franklin Street, 7th Floor
12 Tampa, FL 33602
13 Telephone: (813) 223-5505
14 Facsimile: (813) 222-4736
15
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17
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19
20
21
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23
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25
26
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Attorneys for Plaintiffs

ATTESTATION

I, Amanda Bonn, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

DATED: January 6, 2021

By: /s/ Amanda Bonn
Amanda Bonn